on man. A new approach was evolved by Nussbaum in 1856: he implanted a glass lens in the cornea, and though technically this was successful the eye was invariably lost from irritation. Yet another method of approach was the application of contact glasses, but these had no great utility where the cornea was scarred to any extent. It was only at the beginning of the present century that, with the classical case of Zirm, the first success with corneal transplantation was achieved. The work that has evolved since has been based largely upon the recognition that if a graft is to succeed it must be of human origin, small, and implanted into the cornea itself. At the Oxford Ophthalmological Congress Mr. Tudor Thomas gave an interesting review of the present state of knowledge on this subject. Elschnig of Prague has had experience of no fewer than 139 cases, and Filatov of Odessa of nearly fifty. Tudor Thomas, speaking from experience of twenty-three cases, showed that his own technique gives something like 75 per cent of successes in selected cases. Taking the results as a whole, the percentage of successes was in the neighbourhood of 50. Much apparently depends upon the state of the cornea undergoing grafting; different observers lay down somewhat conflicting criteria, so that even now the question whether opacities due to injury or to disease are the more amenable to treatment must be left open. It would appear that to ensure success some clear cornea must be present. For an operation which as yet has no standardized method and no unequivocal indications, the results reported are distinctly hopeful. There can be no doubt that a promising, even if limited, field of activity has been opened up by this work.—*Brit. M. J.*, 1935, **2**: 121.

# Medico-Legal

## XIII.

### Owens v. Dobson, Lowrie and Owens*

*British Columbia—Mental Hospitals Act (R.S.B.C., 1924, Cap. 158, Sec. 45)—Good faith, or reasonable care of physician certifying insane person as a bar to an action in damages.*

The defendant, Dr. Dobson, who is a specialist in mental diseases, had been called to examine the plaintiff, and in due course certified her insane under the provisions of the Mental Hospitals Act. The plaintiff's husband, however, failed to proceed as required by the Act. Instead, some time later, he had his wife arrested on a warrant and incarcerated upon an information before a magistrate. Again Dr. Dobson was called upon to examine her, and as a result of his second examination, gave evidence at the hearing that he was not then prepared to say that the plaintiff was dangerous. She was thereupon released and subsequently took the present action in damages for malicious prosecution and conspiracy. The matter came before the court in the form of an application for an order that proceedings against the defendant Dr. Dobson be stayed.

Section 45 of the Mental Hospitals Act reads as follows:

> "Judges, Registrars, District or Deputy Registrars, or Stipendiary Magistrates, or Police Magistrates, or Justices of the Peace, who sign the order, or any persons who sign the statement, or duly qualified medical practitioners who sign the medical certificates under any section of this Act, shall not be liable to any civil proceedings on the ground of want of jurisdiction, or on any other ground, if they have acted in good faith and with reasonable care; and if any such proceedings are commenced, they may be stayed upon summary application to the Supreme Court or to a Judge thereof upon such terms as to costs and otherwise as the Court or Judge may think fit, if the Court or Judge is satisfied that no reasonable ground exists for alleging want of good faith or reasonable care; and no action shall be brought against such Judge, Registrar, District Registrar, Deputy Registrar, Stipendiary or Police Magistrate, Justice of the Peace, or duly qualified medical practitioner, except within twelve months next after the release of the party bringing the action, and any such action shall be laid or brought in the county where the cause of action arose, and not elsewhere."

There is a material similarity between this section and the corresponding section of the English Lunacy Act, and counsel for Dr. Dobson quoted jurisprudence on the English Act in support of his contention that proceedings against his client should be stayed. An action should not be maintained against a medical man on the mere assertion that he had come to the wrong opinion in giving a lunacy certificate. It must be shown that the medical man had not acted in good faith or with reasonable care. Furthermore, if a civil action is commenced, proceedings may be stayed upon summary application if the court or judge is satisfied that no reasonable ground existed for alleging want of good faith or reasonable care. The judge ordered the action stayed as against Dr. Dobson. (G.V.V.N.)

* (1935), 49 B.C.R. 283, Morrison, C.J. S.C. (In Chambers).

## XIV.

### Vancouver General Hospital v. Annabelle McDaniel*

*British Columbia—Sterilization as opposed to isolation in the treatment of smallpox—Negligence—Onus of proof —General and approved practice.*

The facts of this case were these. On January 17, 1932, the respondent, Miss Annabelle McDaniel, had been admitted to the Appellant's Infectious Diseases Hospital in Vancouver,

* Privy Council Appeal No. 19 of 1934. An appeal from the Court of Appeal of British Columbia as yet unreported.

suffering from diphtheria. Smallpox was then prevalent in Vancouver, and on and after January 18, smallpox patients were admitted to the hospital and were placed in rooms on the same floor as the respondent's room and adjacent to it. Four sufferers from smallpox having been admitted in this way on January 29, respondent, upon the request of her mother, was moved to another floor of the hospital where there were no smallpox patients. On February 3, the respondent was discharged from the hospital, cured of diphtheria, but on the 12th was found to be suffering from smallpox.

The respondent and her next friend, her father, instituted the present action in damages on the ground that she had contracted smallpox with its consequent disfigurement while in the appellants' hospital and due to their negligence. More specifically, it was alleged that the negligence of the appellants, the defendants in the trial court, was based upon, first, the juxtaposition of the respondent and smallpox patients on the same floor of the hospital, and, secondly, the attendance upon the respondent by nurses who also nursed the smallpox patients. The complaint, in other words, was not that the technique adopted had been faultily carried out by those for whom the hospital was responsible, but that the wrong technique itself had been adopted. The action was based on direct and not vicarious responsibility.

The burden of proving the negligence alleged rested, of course, upon the plaintiff, now the respondent. The only question arising for decision was whether she had discharged that burden. But though the appeal was on a question of fact only, the respondent succeeding or failing, depending upon the court's appreciation of the evidence, still the judgment is interesting as being one of the few appeals upon medical matters which have reached the Privy Council from Canada, and as suggesting certain possible grounds upon which a hospital may be responsible in damages. The case is digested here for these reasons.

Lord Alness, who delivered the judgment of the Privy Council, pointed out that practically the only medical evidence adduced by the respondent was that of Dr. Kennedy, her physician, who stated, "in spite of recent teachings," his preference for the old system of isolation in a separate building of smallpox cases in preference to the new system whereby in effect sterilization is substituted for isolation.

On the other hand, the appellant Hospital had shown that in modern practice the system adopted by them was in vogue throughout Canada and the United States. Furthermore, it had been proved that when the erection of a new infectious diseases hospital in Vancouver was being discussed, a deputation had been sent to visit up-to-date hospitals in the United States and that the deputation had subsequently presented a report of its findings. The appellants' defense was, therefore, twofold: first, that the technique of which the respondent complained was adopted on competent medical advice, and, secondly, that it was in accord with approved modern practice. The appellant, said Lord Alness, had not clearly proved that it had adopted the technique complained of on medical evidence tendered to it. On the other hand, the appellants' technique on the two grounds complained of by the respondent had been approved by several medical witnesses produced by it. Not only did the witnesses personally approve of it, but they affirmed that the criticized technique was in accord with general if not universal practice in Canada and the United States. "A defendant charged with negligence," said Lord Alness, "can clear his feet if he shows that he has acted in accord with general and approved practice." The appellants, in their Lordships' opinion, even if the *onus* rested on them of doing this, had in this case done so by a weight of evidence that could not be ignored.

Judgment was therefore given for the appellant Hospital. It should be emphasized, however, that this decision can in no way be construed as an approval of the technique used by the Hospital in the treatment of smallpox. To quote the words of Lord Alness:

> "Their Lordships, however, cannot make it too clear that they are offering no opinion of their own as to the relative merits of what is termed the unit system in contra-distinction to the isolation system for the treatment of smallpox, nor are they offering any opinion of their own upon the two points in the technique of the appellants which the respondent challenges. Such problems are not submitted to them for decision. Theirs is the simpler task of deciding whether, upon the evidence submitted in this case, the respondent has succeeded in proving that the appellants were negligent. Having regard to the favourable opinion expressed by all the appellants' medical witnesses regarding the technique followed in the Vancouver Hospital, and to the accepted practice in regard to that technique appearing from the same evidence, their Lordships are constrained to hold that the charge of negligence brought by the respondent against the appellants in this case is not established. That is all the length that their Lordships are prepared to go; that is all the length it is necessary to go, in deciding this appeal."

(G.V.V.N.)

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Fortune takes care that Fools should still be seen:
She places 'em aloft, o' th' topmost spoke
Of all her wheel. Fools are the daily work
Of Nature, her Vocation: If she form
A Man, she loses by 't; 'tis too expensive;
'Twould make ten Fools: A Man's a Prodigy.

—Dryden; *Œdipus.*